

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

77-1249

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against -

BARTHOLOMEW BUIGUES, ANGELO PUIG,

IRMA ANES, SUSAN HOROWITZ, AND

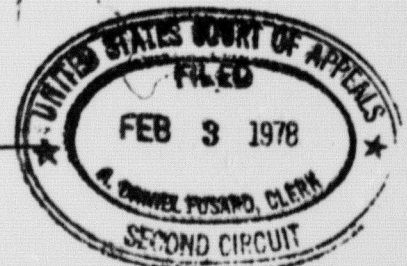
JOHN SAMMARCO,

Defendant-Appellants.

Appeal from a Decision of the Second Circuit of
Appeals from the Southern District of New York
Decided on January 6, 1978.

PETITION FOR REHEARING WITH A SUGGESTION FOR REHEARING EN BANC

REARGUMENT BRIEF FOR AN ORDER EN BANC
FOR DEFENDANT BARTHOLOMEW BUIGUES



UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-1249

UNITED STATES OF AMERICA,

Appellee,

- against -

BARTHOLOMEW BUIGUES, ANGELO PUIG,

IRMA ANES, SUSAN HOROWITZ, AND

JOHN SAMMARCO,

Defendant-Appellants.

REARGUMENT BRIEF FOR THE APPELLANT BARTHOLOMEW BUIGUES

Preliminary Statement

Bartholomew Buigues appeals from judgments of conviction entered December 6, 1976 in the United States District Court for the Southern District of New York, after a six day trial before the Honorable Milton Pollack, United States District Judge and a jury.

Indictment 76 Cr. 864 was filed on August 3, 1976 charging defendants Bartholomew Buigues, Angelo Puig, Irma Anes, Susan Horowitz, and John Sammarco (a) with violating Title 18 United States Code, Section 371 by conspiring to defraud the United States Government and violating Title 18 United States Code, Section 287, and (b) in two (2) substantive counts with violating Title 18 United States Code, Section 287 and two (2) filling false claims with the United States Department of Agriculture.

The trial was conducted on November 29, 30, and December 1, 2, 3, and 6, 1976. All defendants were found guilty on all counts.

Defendants were sentenced on January 17, 1977. Bartholomew Buigues was sentenced to two (2) years on each count to run concurrently, execution of all but three (3) months of which was suspended, and probation for two (2) years.

On January 6, 1978, the Circuit Court of Appeals in a lengthy opinion affirmed the conviction as to Bartholomew Buigues and reserved and dismissed the Indictment to a Co-Defendant.

It is from this order of affirmative to Defendant Buigues that a reargument En Banc is respectfully requested upon the following grounds.

STATEMENT OF THE CASE

A. The Government's Case

In July and August 1975 Youth In government ("YIG"), an otherwise inactive non-profit corporation of which defendant Bartholomew Buigues was Chairman of the Board and defendant Puig

was Executive Director, sponsored a summer lunch program for children in New York City. YIG operated during these months from a store front at 2176 Amsterdam Avenue in Manhattan. The food was purchased from Am PM Food Services and delivered directly to YIG's 43 distribution sites where it was distributed to children. YIG oversaw the entire operation through its employees, many of whom served as monitors at the distribution sites (27-45*).

The program was financed by the United States Department of Agriculture ("USDA"). Originally 63 sites had been selected, but due to a budget cutback at USDA, YIG activities were reduced to 43 sites (113). The budget for the program filed in June 1975 indicated that defendant Irma Anes worked as YIG's Administrative Assistant and that defendant John Sammarco and Susan Horowitz worked as monitors (27-45,113; Exhs. 1, D, E.).

To obtain funding from the USDA, YIG submitted monthly vouchers for reimbursement for its costs of the meals from its supplier, plus an allowance for administration not to exceed six cents per lunch (49; Exhs. 2, 3). YIG filed such vouchers indicating total monthly administrative costs for this purpose on August 22 and August 29, 1975, respectively, for its July and August activities, and received payments for its costs in September 1975.

* All references, unless otherwise indicated, are to pages of the trial transcript.

The payroll book, prepared by Anes who served as YIG's bookkeeper, indicated that all employees of YIG, including these three defendants, worked seven hours a day (Exh. 4). Defendant Anes was paid \$200. per week for her services, or a total of \$1,600. before deductions. Defendants Sammarco and Horowitz were each paid \$110. per week, of \$800. before deductions, for their services (83; Exh. \$).

Three witnesses (Gilchrist, Rogers, and Frank Rodriguez) testified that they had worked for YIG during the summer as monitors receiving \$110. per week, two of them for less than seven hours per day. Pedro Rodriguez testified that he was an office clerk in July and served as a monitor in August. All four witnesses testified that defendants Sammarco and Horowitz were introduced to them by Puig as supervisors of the program at a meeting on June 27, 1975. They also testified that they thereafter saw Sammarco at the office on a number of occasions during the following month, and that they saw Susan Horowitz relatively little thereafter (108-21, 219-30, 278-88, 355-63). On cross-examination, however, Gilchrist and Rogers admitted that as monitors they spent little time at the office during the day because they were usually visiting distribution sites (153, 338).

A representative of Arawak Consulting Corporation testified that Susan Horowitz was employed full time by Arawak as a Staff Associate in July and August 1975 (459-73; Exh. 15-17). A representative of Querer, Inc. testified that Irma Anes was

on YIG's books nights and weekends. Puig admitted meeting Rogers on the street but denied any threat having occurred in his presence (811-14).

Puig's testimony was corroborated by a number of other witnesses. Nat Paul Missieli, Production Manager of AM PM Food Services, testified that Horowitz regularly reported at his plant where the food was prepared each morning (637-39). Janet Nieves testified that she reached Horowitz at AM PM Food Services by telephone, and knew Sammarco as YIG's liaison with the USDA and saw him frequently (684). Four witnesses testified that they regularly reached Sammarco by calling him at YIG's office (611-15, 929-34). Two other YIG monitors also described their functions and the fact that one of them saw Horowitz, Anes and Sammarco at YIG's office (654-64, 936-39). Defendant Bartholomew Buigues denied that any of the three were hired for "no show" jobs, and testified that each of the three persons concerned worked on the job they were hired for (973-80, 998). Irma Anes testified that although she worked at Querer during the days, she regularly worked on YIG's books at YIG's office in the evenings (700-29).

Robert Eadie, Manhattan Borough Co-ordinator for the USDA Summer School Program, testified with respect to a USDA budget cut which caused the allowance to YIG to be substantially reduced, an on-site inspection of YIG, and the absence of guidelines issued by the USDA for sponsoring organizations with respect to its employees (548-94).

Frank Cedo, who had borrowed \$1,000. for YIG from Sammarco, and Sammarco's aunt described the circumstances of the loan (611-15, 620-25). Five character witnesses were called by Horowitz (836-37, 840-41, 952-62) and three by Defendant Buigues (669-70, 826-33), one of also whom testified for Puig (826-27).

POINT I

The Court erroneously deemed that there was sufficient evidence on the record to convict Defendant Buigues.

A clear reading of the record will show that Buigues in no way shape or form received any compensation for his services during the Program. In fact, the testimony will show (740 line 15) that Buigues had no knowledge that false entries of seven (7) hours per work day was entered by the bookkeeper (739). The infrance in this Honorable Courts Decision - because he was the boyfriend of the bookkeeper he should have known that the entries were false and should have known them to be so - is like a husband who gives his pay to his wife who records the expending of the money and tells the husband all the money was paid out accordingly - only to find out that is not so. The Defendant was not the bookkeeper, he received no compensation yet this Court has deemed that a Co-Defendant who admitted she worked only few hours a day has had her conviction reversed and Indictment dismissed. Perhaps the Court has lost sight of the fact that none of the monies used for Payroll was pocketed by the Defendant or the Bookkeeper. In short this Defendant worked hard long hours with an unjust conviction for

his labors. Nowhere in this Trial record can it be shown that this Defendant profited in any way.

POINT II

The inflammatory questioning and remarks by the Assistant U. S. Attorney was so prejudicial and beyond the scope of fair play; as to warrant a reversal granting appellant a new trial in the interest of justice in this case.

This Honorable Courts lengthy decision fails to express an opinion to Defendants Point II on Appeal. It is respectfully submitted again - that the inflammatory questioning that Defendant received a \$20,000. pay off was a deliberate act to prejudice this Defendants right to a fair trial. It is again respectfully submitted that in no way was this remark called for. In fact there was never any reason whatsoever for this kind of questioning. The Assistant U. S. Attorney's reason was because he had some information in private and could not reveal it to Defendant - but only to the Court, is nothing but a pure lie. This Defendant respectfully request this Honorable Court to order the Assistant U. S. Attorney to give him a copy of the affidavit submitted to the Court under the Freedom of Information Act, so that he may have an opportunity to rebut this false claim. Please see cases submitted in Defendant's Appeal Brief Point II.

Wherefore, Defendant prays that this Honorable Court en banc reconsider its previous opinion and further give

this Defendant an opportunity on oral argument before a
decision is again rendered.

Respectfully Submitted,

Bartholomew Buigues 2/3/78

BARTHOLOMEW BUIGUES

DEFENDANT

ROBERT E. ROSE JR.

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FEB 3 1973

U. S. ATTORNEY
SO. DIST. OF N. Y.